STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 10, 2012
v	No. 301668 Wayne Circuit Court
KARON CORTEZ CRENSHAW, Defendant-Appellant.	LC No. 09-023757-FC

Before: BORRELLO, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was also charged with, and acquitted of, carjacking, MCL 750.529a, and the unlawful driving away of an automobile, MCL 750.413. Defendant was sentenced, as a second habitual offender, MCL 769.10, to 15 to 30 years' imprisonment for the two armed robbery convictions, one to seven and one-half years' imprisonment for the felon-in-possession conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and for the reasons set forth in this opinion, we affirm in part, reverse in part, and remand.

Michael Dahl (Dahl) testified that on August 19, 2009, at 9:00 a.m., he and Lewis Vernon Smith II (Smith) made plans to go to Hawthorne Street in the city of Detroit, Michigan. They eventually met up with "Kevin" and "Peanut"[1] in front of a camper parked in a driveway on Hawthorne Street. After getting into the car, Smith, "Peanut," and "Kevin" smoked some marijuana. "Peanut" and "Kevin" asked if Dahl and Smith would take them to a white house at 19125 Russell Street, in the city of Detroit. After stopping at Russell Street, Dahl agreed to stop and pick someone else up. "Kevin" and "Peanut" both got out of the car and went inside the house, emerging about ten minutes later with defendant.

[1] Dahl only knew these two men by their nicknames, "Kevin" and "Peanut." Dahl had known "Kevin" and "Peanut" for four or five months. Smith knew "Kevin" and "Peanut" a couple of months.

After defendant got into the car, he told Dahl and Smith to go around the block to Hannah Street. Defendant then pointed out a house on Hannah Street and the men stopped in front of that house and "Kevin," "Peanut," and defendant got out of the car and went behind the house on Hannah Street. Dahl, Smith, and "Peanut" went inside the house and "Peanut" locked the door behind them. Dahl immediately saw "Kevin" inside the house. Defendant then came out with a gun that looked like an old army gun and cocked it. Dahl and Smith said, "[A]re you serious?" Defendant responded, "You think I'm playing," and then defendant pulled the trigger while pointing the gun at Dahl and Smith. The gun "clicked" but did not go off. Defendant then told Dahl and Smith to get on the ground, which Dahl and Smith did. Defendant told Dahl and Smith to lay flat on their faces, and told "Kevin" and "Peanut" to go through their pockets. Defendant then told Dahl and Smith to take their pants off, after which defendant and "Kevin" went through Dahl's pockets and took Dahl's Safe Link cell phone, a pack of cigarettes, and $20. "Peanut" went through Smith's pockets. "Kevin" and "Peanut" took Smith's cell phone, wallet, keys, and cigarettes. Following the robbery, Dahl stood up and looked out of the window and saw defendant drive off in Smith's Chevy with "Kevin" and "Peanut." Dahl and Smith then went to a gas station and telephoned police.

The responding officers radioed information regarding the make and model of the stolen vehicle. Detroit police officers found that vehicle, and while conducting surveillance on the vehicle, saw "Peanut," later identified as Darian Baker, get into the vehicle and drive away. He was arrested a short distance from where police initially located the vehicle.

Dahl and Smith were called into the police station to identify their property. While there, both identified defendant from three photo arrays as the man who held a gun on them, took their property and drove away in the Chevy.

On appeal, defendant argues that offense variables (OV) 12 and 13 were improperly scored, which resulted in an improper minimum sentence guidelines range for his armed robbery convictions. Defendant asserts that OV 12 should have been scored zero points rather than five points, and OV 13 should have been scored zero points rather than 25 points.

"This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Phelps*, 288 Mich App 123, 135; 791 NW2d 732 (2010) (quotation marks and citations omitted). "The interpretation and application of the legislative sentencing guidelines, MCL 777.1 *et seq.*, involve legal questions that this Court reviews de novo." *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). This Court will affirm a trial court's scoring decision where there is evidence existing to support the score. *Phelps*, 288 Mich App at 135.

Armed robbery, MCL 750.529, is a Class A felony against a person. MCL 777.16y. Carjacking, MCL 750.529a, is a Class A felony against a person. MCL 777.16y. For all crimes against a person, the trial court must score offense variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19, and 20. MCL 777.22. MCL 777.42 governs OV 12 and, in relevant part, provides the following:

> (1) Offense variable 12 is contemporaneous felonious criminal acts. Score offense variable 12 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Three or more contemporaneous felonious criminal acts involving crimes against a person were committed [25 points]
>
> (b) Two contemporaneous felonious acts involving crimes against a person were committed [10 points]
>
> (c) Three or more contemporaneous felonious criminal acts involving other crimes were committed [10 points]
>
> (d) One contemporaneous felonious criminal act involving a crime against a person was committed [5 points]
>
> (e) Two contemporaneous felonious criminal acts involving other crimes were committed [5 points]
>
> (f) One contemporaneous felonious criminal act involving any other crime was committed [1 point]
>
> (g) No contemporaneous felonious criminal acts were committed [0 points]

A felonious criminal act is contemporaneous if the act occurred within 24 hours of the sentencing offense and the act has not and will not result in a separate conviction. MCL 777.42(2)(a).

"A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993). "[If] a defendant has effectively challenged an adverse factual assertion contained in the presentence report or any other controverted issues of fact relevant to the sentencing decision, the prosecution must prove by a preponderance of the evidence that the facts are as asserted." *Id*. Additionally, record evidence that a defendant was accused of wrongdoing but does not support that he engaged in felonious criminal activity should not be used to score an offense variable. *Phelps*, 288 Mich App at 142.

Here, defendant was convicted of two counts of armed robbery, MCL 750.529. Defendant was sentenced, as a second habitual offender, MCL 769.10, to 15 to 30 years' imprisonment for the two armed robbery convictions. According to the Sentencing Grid for Class A Offenses, MCL 777.62, defendant's minimum sentence range, as a second habitual offender, MCL 777.21(3)(a), for his armed robbery convictions was calculated at 135 months to 281 months. Defendant's prior record variable score (PRV) total was 52 points and his OV total was 70 points. Defendant was also charged with, and acquitted of, carjacking, MCL 750.529a, and unlawfully driving away an automobile, MCL 750.413. Additionally, at the time of sentencing, defendant had a separate armed robbery charge, MCL 750.529, pending against him,

which also allegedly occurred on August 19, 2009. However, the trial court dismissed this armed robbery charge at defendant's sentencing for not being a good use of time or resources.

There does not appear to be any record evidence regarding defendant's pending armed robbery charge. Therefore, we hold that this charge could not have been used to calculate OV 12. See *Phelps*, 288 Mich App at 141-142; *Ratkov*, 201 Mich App at 125. However, there is record evidence to support the trial court in considering defendant's carjacking charge in scoring OV 12. "A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking." MCL 750.529a(1). As previously stated, testimony was introduced at trial that the robbery victims identified defendant as the person who pointed a gun at them, took their belongings, including their car keys and drove off in their vehicle. This Court has stated: "Because the prosecution must prove controverted factual assertions underlying the scoring of the sentencing guidelines by a preponderance of the evidence rather than beyond a reasonable doubt, situations may arise wherein although the factfinder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing." *Ratkov*, 201 Mich App at 126. Therefore, we hold that the trial court did not err in scoring OV 12 at five points because it could have considered defendant's carjacking charge as one contemporaneous felonious criminal act involving a crime against a person under MCL 777.42(1)(d).

MCL 777.43 governs OV 13 and provides, in relevant part:

> (1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (c) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person [25 points]
>
> (d) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)(*i*) to (*iii*) or section 7403(2)(a)(*i*) to (*iii*) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403 [10 points]
>
> * * *
>
> (g) No pattern of felonious criminal activity existed [0 points]

In *People v Bemer*, 286 Mich App 26, 33-34; 777 NW2d 464 (2009), this Court concluded the following:

> When determining the appropriate points under this variable, all crimes within a 5–year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction. MCL 777.43(2)(a). Although MCL

> 777.43(2)(a) clearly requires a trial court to consider all crimes within a 5–year period, this requirement must be understood in light of MCL 777.43(2)(c), which prohibits a trial court from considering conduct that was scored under MCL 777.41 and MCL 777.42 unless the conduct scored under those statutes was related to membership in an organized criminal group. Accordingly, the trial court must generally consider all crimes within a 5–year period except those crimes that were already scored under OV 11 and OV 12. [Quotation marks omitted.]

Therefore, "the trial court must score OV 12—and must score it using *all conduct that qualifies* as contemporaneous felonious criminal acts—before it can proceed to properly score OV 13." *Bemer*, 286 Mich App at 35 (emphasis added).

Defendant's prior charges and convictions included a July 30, 2007, conviction for attempted possession of narcotics less than 25 grams, MCL 750.92 and MCL 333.7403(2)(a)(v) and a November 9, 2007, conviction for possession with intent to deliver less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(iv). Additionally, at the time of sentencing, a separate first-degree murder charge, MCL 750.316, was pending against defendant, which allegedly occurred on March 19, 2009.

First, we hold that defendant's pending armed robbery charge from a separate case, and his carjacking and unlawfully driving away an automobile charges, which he was acquitted of, cannot be considered in the scoring of OV 13 because they would be considered conduct that qualified as contemporaneous felonious criminal acts. *Bemer*, 286 Mich App at 35. We also hold that defendant's two prior drug convictions under MCL 333.7403(2)(a)(v) and MCL 333.7401(2)(a)(iv) could not be used in considering the scoring of OV 13. See MCL 777.43(1)(d) ("The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)(*i*) to (*iii*) or section 7403(2)(a)(*i*) to (*iii*)."). See also, *People v Bonilla-Machado*, 489 Mich at 424. Also, it appears that there was no record evidence regarding defendant's pending first-degree murder charge at the time of sentencing, therefore, we hold that this pending charge also could not have been used in scoring OV 13. *Phelps*, 288 Mich App at 141-142; *Ratkov*, 201 Mich App at 125. Therefore, only defendant's two armed robbery convictions could have been used in scoring OV 13. Therefore, we hold that OV 13 should have been scored at zero points for no pattern of felonious criminal activity pursuant to MCL 777.43(1)(g). See MCL 777.43(1)(a)-(g). See also, *Bonilla-Machado*, 489 Mich at 427.

Our holding that defendants OV score should have been 45 points rather than 70 points, leads us to conclude that according to the Sentencing Grid for Class A Offenses, MCL 777.62, defendant's minimum sentence range, as a second habitual offender, MCL 777.21(3)(a), for his armed robbery convictions should have been calculated at 126 months to 262 months. Because the change in the total OV points alters defendant's recommended minimum sentence range, we vacate defendant's sentences for armed robbery and remand for resentencing in accordance with this opinion. *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006).

Next, defendant argues that there was insufficient evidence for a rational trier of fact to find beyond a reasonable doubt that defendant committed these crimes. In reviewing the

sufficiency of the evidence, this Court reviews the evidence de novo, in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005), overruled on other grounds *People v Nyx*, 479 Mich 112 (2007); *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). This Court determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id*.

"The elements of armed robbery are: (1) an assault and (2) a felonious taking of property from the victim's presence or person (3) while the defendant is armed with a weapon." *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007). Under MCL 750.224f, a convicted felon generally may not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm until he has regained this right. See *People v Dupree*, 486 Mich 693, 704-705; 788 NW2d 399 (2010). The elements of felony-firearm, MCL 750.227b, are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007).

The positive identification of a defendant by a witness may be sufficient to support a defendant's conviction of a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of witnesses' identification testimony is a question for the trier of fact that this Court does not resolve anew. *Id*. Additionally, "[c]ircumstantial evidence and reasonable inferences drawn [from it] may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Defendant only challenges the identification element of these crimes and the identification of the gun used to commit these crimes. However, Dahl and Smith identified defendant during trial as the third perpetrator of these crimes, who threatened them with a gun. There exists an independent basis for their in-court identifications of defendant. Smith and Dahl saw defendant as he came out of a house and got into a car with them. There is also evidence that Smith, Dahl, "Peanut," and "Kevin" went inside a house and thereafter Smith and Dahl saw defendant come out with a gun. Dahl and Smith said, "[A]re you serious?" Defendant responded, "You think I'm playing," and then defendant pulled the trigger while pointing the gun at Dahl and Smith. The gun "clicked" but did not go off. Defendant then told Dahl and Smith to get on the ground, which Dahl and Smith did. Defendant told Dahl and Smith to lay flat on their faces and told "Kevin" and "Peanut" to go through their pockets. Defendant then told Dahl and Smith to take their pants off, which Dahl and Smith did. Defendant grabbed Dahl's and Smith's pants and defendant, "Kevin," and "Peanut" then went through Dahl's and Smith's pockets. "Kevin" and "Peanut" took Smith's cell phone, wallet, keys, and cigarettes. Defendant and "Kevin" went through Dahl's pockets and took Dahl's cell phone, a pack of cigarettes, and $20. Dahl saw defendant drive off in Smith's Chevy with "Kevin" and "Peanut." Also, Dahl and Smith pointed out to police a white house on Seven Mile and Russell as the house where they picked defendant up. There is evidence that this information was used by the police to obtain and conduct a search warrant of a house located at Seven Mile and Russell. Smith and Dahl identified their cell phones from the phones seized from this house during the search. Also, defendant was at the house on Russell Street and was taken into custody during the execution of the search warrant. Therefore, we hold that there was sufficient evidence, beyond a reasonable doubt that a rational trier of fact could have used in identifying defendant as the third perpetrator of these crimes.

Next, defendant argues that the photo arrays were unduly suggestive. In order to preserve a constitutional error, which implicates a defendant's due process rights for review by this Court, it must be raised in the trial court. *People v Williams*, 245 Mich App 427, 430-431; 628 NW2d 80 (2001). Defendant did not raise an issue regarding the photo arrays in the trial court. Therefore, this issue has not been preserved for review. Accordingly, we presume without deciding that defendant's argument alleges a constitutional error because it implicates his due process rights. See *Id*. This Court reviews unpreserved claims of constitutional error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

"The fairness of the identification procedure must be evaluated in the light of the totality of the circumstances. The test is the degree of suggestion inherent in the manner in which the suspect's photograph is presented to the witness for identification." *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). An identification procedure violates a defendant's right of due process of law "when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). Improper suggestion often arises when a witness is asked if he can identify the culprit of a crime and is shown only one person or a group of people in which one person is singled out in some way. *Id*.

Defendant argues that the photo arrays presented to Dahl and Smith were unduly suggestive; however, there is no evidence to support defendant's claim. The police asked Smith to look at a photo array of six or eight individuals. Smith identified photo number five, defendant, as one of the suspects. Smith was able to identify defendant by his "unmistakable eyes." Dahl was also asked to look at a photo array of six people. Dahl identified defendant as the perpetrator that had the gun. Furthermore, the police did not tell Dahl that one of the suspects' pictures was in the line-up. Therefore, we hold that the photo arrays presented to Dahl and Smith were not unduly suggestive. *See Gray*, 457 Mich at 111.

Defendant also asserts that the photo arrays were improper because defendant was in custody, and his right to counsel was violated because the police failed to provide him with the representation of counsel during these photo arrays. "Subject to certain exceptions, identification by photograph should not be used where the accused is in custody." *People v Kurylczyk*, 443 Mich 289, 298; 505 NW2d 528 (1993) (emphasis, quotation marks, and citations omitted). "Where there is a legitimate reason to use photographs for identification of an in-custody accused, he has the right to counsel as much as he would for corporeal identification procedures." *Id*. (emphasis, quotation marks, and citations omitted); see also *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001).

There is evidence that defendant was in custody at the time of the photo arrays. The record is silent regarding whether counsel was present at the photo arrays. We hold that even assuming error in the photo arrays, as we concluded above, the record shows that Smith and Dahl had a basis for their in-court identification of defendant independent of the photo arrays. Because defendant has failed to show that any error in admitting the photo array identifications of defendant affected the outcome of the trial, we hold that any error in admitting evidence regarding the photo arrays was harmless given the overwhelming evidence of defendant's guilt,

and thus, did not affect defendant's substantial rights. See *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995).

We affirm defendant's convictions, but vacate defendant's armed robbery sentences and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher